IN THE

Supreme Court of the United States

OCTOBER TERM—1952

No. ~~230~~ 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, hereinafter referred to as the Union, respectfully prays that a writ of certiorari issue to review a decree of the United States Court of Appeals for the Second Circuit, entered May 20, 1952, enforcing an order of the National Labor Relations Board, issued April 18, 1951, in a proceeding instituted against the Union pursuant to Section 10 (e) of the Labor Management Relations Act of 1947, hereinafter referred to as the Act (61 Stat. 136, 29 U. S. C. Supp. IV, Section 151, *et seq.*).

History of the Case and Opinions Below

This cause came before the United States Court of Appeals for the Second Circuit (hereinafter referred to as the Court below) upon a petition of the National Labor Relations Board (hereinafter called the Board) for enforcement of its order issued April 18, 1951 (B. A. 1-5).*

The order followed the filing of charges by William Christian Fowler, (hereinafter called "Fowler"), upon which the Board issued its complaint. The complaint issued only after the General Counsel to the Board had overruled the determination of the Board's Regional Director that no complaint should issue on the basis of the facts disclosed by his investigation of the charge (R. A. 2).**

The Board's order, adopted with modifications the findings and conclusions of the Trial Examiner which found the Union guilty of violations of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act. Board Member Murdock dissented *in toto,* and Board Member Reynolds dissented in part (B. A. 22-37). The Board's decision is reported at 93 N. L. R. B. 249.

By a divided Court, the Court below decreed enforcement of the Board's order. The majority opinion written by Judge Swan and concurred in by Judge Learned Hand, and the dissenting opinion of Judge Clark are appended to the record (R. A. 78-90). They are not yet officially reported.

The decision of the Court below will remain final unless jurisdiction is taken by this Court.

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* "B. A." refers to Board's Appendix.
** "R. A." refers to Respondent's Appendix.

Summary Statement of Matters Involved

This case presents:

1. The refusal of the Court of Appeals to disapprove the failure of the National Labor Relations Board to join both employer and union as parties to a cause involving a simultaneous violation of 8 (b) (2) and 8 (a) (3) as required by the rule enunciated in the case of *N. L. R. B.* v. *Newman*, 85 N. L. R. B. 725, enforced (C. A. 2) 187 F. (2) 488; and the refusal of the Court below to recognize the impropriety of incorporating a back pay provision in a decree which contains no reinstatement provision, thus contravening Section 10 (c) of the Act.

2. The refusal of the Court of Appeals to give effect to the rights of free speech preserved by Section 8 (c) of the Taft-Hartley Act, and the refusal of the Court below to distinguish between an 8 (b) (2) case and an 8 (b) (4) (A) case in applying the doctrine enunciated by this Court in *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 694 pertaining to Section 8 (c).

3. The refusal of the Court of Appeals to follow decisions of the Third, Seventh, Eighth and Ninth Circuits which require a showing that discrimination had the purpose and effect of "encouraging membership"; and the adoption by the Second Circuit of the theory of "inherent encouragement" which has been repudiated in the other Circuits (*infra*, pp. 22-24).

4. The refusal of the Court of Appeals to give effect to a valid Union security agreement, asserted as a defense, on the basis of a strict construction of the language of the contract, in disregard of clear proof as to the understanding and practices of the parties thereunder.

Most briefly summarized, the facts are:

As exclusive bargaining representative of the radio officers employed by 24 named steamship companies, including the Bull Steamship Company (hereinafter called the "Company"), the Union and said companies executed a standard collective bargaining agreement on January 11, 1947, covering the Company's radio officers. After the enactment of the Taft-Hartley Act, but prior to its effective date, the Union and the Company, on August 16, 1947, extended the term of the agreement until August 15, 1948.[1] The pertinent provisions of the collective bargaining agreement with respect to the employment of radio officers, are set forth in the opinion of the Court below (R. A. 80-81).

It is undisputed that, in actual operation, the employment procedure which had been generally followed by the parties to the agreement prior to the extension of the term of the agreement was that of a typical union hiring hall arrangement, *i. e.*, the Companies under contract with the Union requested the Union to furnish radio officers to fill vacancies as they occurred. To meet these requests, the Union's rules and by-laws provided for the maintenance of a "shipping list" of its unemployed members arranged in the order of the termination of their last employment. When a request for a radio officer was received from a Company, the Union offered the assignment to those of its members who were seeking assignment, preference being given to the member longest unemployed. The member entitled thereto by the application of these rules was given "the necessary 'clearance'" (R. A. 82).

Fowler, a ship's radio officer, joined the Union on July 1, 1942, and was a member thereof in February and April of 1948.

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[1] The validity of the contractual provisions theretofore in existence were thus preserved under Section 102 of the Act.

It has been found that on or about February 28, 1948, and on or about April 26, 1948, Fowler was offered employment directly by the Company, subject to his ability to obtain "the necessary 'clearance'" from the Union; that the Union refused to issue the necessary clearance; that the Company refused to hire Fowler without the clearance; that Fowler was thus deprived of the proffered employment (B. A. 58).

The Board found that the Union's refusal to issue the clearance to Fowler was motivated by its desire "to enforce against him as one of its members, the rules of fair dealing between its members it had prescribed for their mutual benefit" (B. A. 59). More specifically, that the Union refused clearance because (1) it wished to express its disapproval of the attempt to hire Fowler directly in circumvention of its hiring hall rules, and (2) because in the February incident, Fowler's hire by the Company would have caused the displacement of Kozel, another member of the Union, whose services had been admittedly satisfactory to the Company (B. A. 59).

Based on the foregoing facts, it has been found that the Union violated 8 (b) (2) and 8 (b) (1) (A) of the Act. The reasoning to support this finding runs thus: despite the rules of the Union and the practices of the parties to the contract, the language of the contract was such that it obligated the Union to issue a clearance to any member in good standing or, at any rate, did not clearly justify the Union's refusal to issue such clearance; the Union's refusal to issue clearance caused the Company to discriminate against Fowler in a manner violative of Section 8 (a) (3); hence, the Union was guilty of violating 8 (b) (2). Further, that in refusing clearance, the Union was attempting to compel Fowler to conform to the hiring hall practice above described, thus "coercing and restraining" him in the exercise of his right "to refrain from concerted activities" as guaranteed in Section 7 of the Act,

and that the Union thereby violated Section 8 (b) (1) (A) of the Act (B. A. 64-68).

Inter alia, the Union contended:

(1) that the failure of the Board to join the employer as a party to the proceeding was fatal to the proceeding because (a) such failure was in contravention of the basic purposes of the Act and the policies of the Board adopted in furtherance thereof; and (b) that in the absence of a reinstatement provision, rendered impossible by the failure to join the employer, the back pay provision of the decree (R. A. 91) contravenes Section 10 (c) of the Act;

(2) that the refusal of the Union to issue clearance, unaccompanied by any "threat of reprisal or force or promise of benefit" constituted an expression of its views which was within the protection of Section 8 (c) of the Act;

(3) that the Union's actions were not intended to and did not have the effect of "encouraging" Union membership;

(4) that the contract and the long standing practice of the parties justified the Union in applying to Fowler the same rules governing the orderly assignment of work that applied to all other members of the Union and constituted a valid defense to its allegedly discriminatory conduct.

All of these contentions were overruled by the Trial Examiner, the majority of the Board, and the majority of the Court below.[2]

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[2] The Court below did leave open for determination in the compliance proceedings the question of the effect upon the back pay provision, of Fowler's refusal to accept comparable work on other ships (R. A. 85).

Jurisdiction

The jurisdiction of this Court to review the decree of the United States Court of Appeals is invoked under Section 10 (e) of the National Labor Relations Act and Section 1254 of the Judicial Code.

Questions Presented

1. Where it is charged that a Union violated 8 (b) (2) of the Act in that it caused an employer to violate 8 (a) (3) of the Act, (a) Is it proper for the Board to omit the employer as a party and proceed solely against the Union?; (b) Assuming that this may be done, does Section 10 (c) of the Act permit a back pay provision in the absence of a reinstatement direction?

2. Is a Union deprived of its right of free speech as guaranteed by Section 8 (c) when it is found guilty of violating Sections 8 (b) (2) and 8 (b) (1) (A), despite the fact that "no threat of reprisal or force or promise of benefit" is made?

3. May a finding that discrimination was practiced for the purpose of "encouraging membership" be predicated upon an assumption that discriminatory conduct constitutes "inherent" encouragement of membership?

4. Is the existence of a valid union security arrangement, actually practiced by the parties, unavailable as a defense unless evidenced by clear written language?

Reasons for Granting the Petition

The Court below has passed on several important questions affecting substantial rights under the Taft-Hartley Act. The decision rests upon a pronouncement by the Court below which encompasses several principles of law

of widespread application and significance in the administration of the Act. To reach its conclusion in the instant case, the Court below adopted a series of premises as to the law which find no support in the Act, or in judicial precedent. We believe this to be demonstrated in our brief.

Thus, the Court below, approved the action of the Board in omitting the employer as a party to this proceeding—where the facts were such that the Union could not be guilty of an 8 (b) (2) violation unless the employer were equally guilty of an 8 (a) (3) violation—and this, despite the fact that this constituted a clear and unquestioned departure from established Board policy as enunciated in *N. L. R. B.* v. *Newman, supra,* and consistently followed since. As one consequence thereof, the decree herein contravenes Section 10 (c) of the Act in that it contains a back pay provision despite the fact that no reinstatement provision is contained therein.

So too, relying upon *International Brotherhood of Electrical Workers* v. *N. L. R. B., supra,* the Court below opined that the Union's rights under 8 (c) of the Act were not infringed despite the absence of "any threat of reprisal or force or promise of benefit"; the Court below thus applied to the instant 8 (b) (2) case, the rules of law which this Court applied to a secondary boycott case; and in so holding, the Court below inexplicably ignored the distinction clearly pointed out by this Court in its opinion in *International Brotherhood of Electrical Workers* v. *N. L. R. B.* (*supra*), between a violation of Section 8 (b) (4) (A) and a violation of Section 8 (b) (2).

So too, the Court below invoked the theory of "assumed" or "inherent" encouragement of Union membership and thus brought itself in direct conflict with decisions in the Third, Seventh, Eighth and Ninth Circuits, where this theory has been repudiated.

So too, in holding that the actual practice of the contracting parties must be disregarded in favor of a strict

construction of the language of the contract, the decision of the Court below is in direct conflict with decisions of the Ninth Circuit.

The profound effect of the application of the principles enunciated in this case to future cases arising under the Act is such that review of the same by this Court is fully warranted. The sharp differences of opinion evoked by this case in the Board and the Court below attest to the unsettled nature of the questions involved and indicate the immediate and future significance of these questions in the field of labor relations. These questions should be settled by this Court.

Conclusion

WHEREFORE, petitioner respectfully prays that a writ of certiorari may be issued out and under the seal of this Court directed to the United States Court of Appeals, Second Circuit, to the end that the order and judgment of the said United States Court of Appeals in this case be reviewed and reversed and for such other and further relief as may be just and proper.

Dated July 23, 1952.

Respectfully submitted,

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Appendix

Statutes Involved

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

((3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 *et seq.*), are as follows:

Appendix.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and

(ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment or grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some

ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of ap-

peals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to grant such temporory relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this

Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The failure to join the employer as a party to the proceeding constituted fatal error.

The finding that the Union in the instant case violated Section 8 (b) (2) is predicated on the finding that it caused the employer to engage in conduct which was violative of Section 8 (a) (3).[3]

[3] The Union's contention that the employer's conduct was not violative of 8 (a) (3) under the rule enunciated in *Colgate Palmolive Peet Co.* v. *N. L. R. B.*, 338 U. S. 355, and that hence the Union was not guilty of violating 8 (b) (2) was overruled.

It is thus apparent that if the union was guilty of vioing 8 (b) (2) the Company was equally guilty of violating 8 (a) (3). *N. L. R. B.* v. *Herald Tribune,* 93 N. L. R. B. 419. Yet the complaint herein was directed solely against the Union. The Board did not deign to explain its failure to join the Company as a party to this case, but rather contented itself with maintaining that it had the discretionary power to select the respondent against which it would proceed. It relied for this discretionary power upon the cases of *Union Starch & Refining Company* v. *N. L. R. B.* (C. A. 7), 186 F. 2nd 1008, certiorari denied, 342 U. S. 815, and *N. L. R B.* v. *Newspaper and Mail Delivers Union* (C. A. 2), 192 F. (2nd) 654.

In sustaining the Board's contention on this score, the Court below failed to recognize the distinction between the cited cases and the case *sub judice,* and thus sanctioned conduct of the Board which constituted a clear departure from the established policy of joining employer and union as enunciated by the Board in the case of *N. L. R. B.* v. *Newman, supra.*

In the latter case the Board, explaining its rationale with respect to the joint liability of employer and union, pointed to the following controlling considerations:

(1) In the final analysis, it is the Employer and not the Union that controls the hiring and discharge of his employees.

(2) Undesirable consequences would flow from the failure to join the employer:

(a) Employers would be willing to "buy peace" by acceding to union's demands, knowing that the Board would permit them to escape liability;

(b) Minority groups, knowing they could no longer rely on the employer's financial self-interest to

protect their rights, would be inclined to resort to self-help;

(c) Cases against discordant employees would tend to increase, with the removal of the brake of the employer's self-interest.

The case of *Union Starch & Refining Co., supra,* did not detract from this rationale. In that case, the contention was advanced by the employer that the language of Section 10 (c) required that back pay must be assessed against *either* an employer or a union, *not both.* The Court held that the Board was vested with a reviewable discretionary power to issue a back pay order against the employer or the union, *or* both.

In the case of *N. L. R. B.* v. *Newspaper and Mail Delivers Union, supra,* the employer and the union were initially joined, but a settlement agreement was reached with the employer before the case had reached its final conclusion. Under these circumstances, the Court held that it was proper to continue the proceedings against the union alone. But the distinction between the above cited cases and the instant case, is apparent.

It is settled beyond cavil that the existence of coercive union pressure affords no defense to employer discrimination. *Cf. N. L. R. B.* v. *National Broadcasting Co.* (C. A. 2) 150 F. (2) 895, 900.

In the instant case no reason whatsoever was advanced for the failure to join the employer. Hence, even if it be assumed *arguendo* that the Board has the power to determine who shall be named in and who shall be omitted from a complaint, the failure to join the employer in the instant case was a clear abuse of discretion. The approval by the Court below of the Board's omission of the employer, if left undisturbed, opens wide the door to arbitrary ac-

tion. The discretion which has been held to be a reviewable discretion (*Union Starch & Refining Company, supra*) becomes an absolute discretion.

The consequences, including the possibilities of collusive injury and of arbitrary favoritism, inherent in the approval of this practice under the circumstances here involved are such that they should be condemned by this Court. This is not to say that cases may not arise where it will be proper to proceed against a union alone or an employer alone. Thus, where a union attempts to cause discrimination but the attempt proves unsuccessful because of employer resistance obviously it would be proper to proceed against a union alone, for 8 (b) (2) would be violated though 8 (a) (3) would not. So too, where an employer acknowledges his guilt and agrees to remedy his discriminatory practices, it would obviously be proper to proceed against the union alone. These are rules dictated by necessity and by reason; but the action of the Board in omitting the employer in the instant case was dictated by no such valid consideration.

As one consequence of the failure to join the employer herein, the decree in the instant case clearly contravenes Section 10 (c) in that it contains a back pay provision although no reinstatement direction is contained therein. We urge that, assuming that the Board was empowered to omit the employer as a party, thus precluding itself from the making of a reinstatement direction, it could not decree the payment of back pay against the Union. The language of Section 10 (c) makes it clear that back pay is an incident of reinstatement. Thus, it is "* * * reinstatement of employees with or without back pay * * *" which may be ordered; and under the proviso of Section 10 (c), payment of back pay may be required of a union or employer, as the case may be "* * * *where an order directs reinstatement of an employee* * * *.*" (Em-

phasis supplied.) The lack of judicial sanction for the type of order made herein has been recognized by the Board (Sixteenth Annual Report of the National Labor Relations Board, pp. 243-244).

POINT II

The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act; and the Court below erred in ruling that *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 694, warranted such deprivation.

The Union maintained that its refusals to issue clearance constituted an expression of its views against the improper discharge of a satisfactory radio officer and against the circumvention of rules designed to accomplish a fair and equitable distribution of work; and that the expression of such views, unaccompanied by any "threat of reprisal or force or promise of benefit" was protected by the provisions of Section 8 (c) of the Act.

The Court below held:

> "No threats or promises to the company were necessary. See *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 2 Cir., 181 F. 2nd 34, 38, aff'd 341 U. S. 694." (R. A. 84-85).

In so holding the Court below applied to this 8 (b) (2) case the rule which this Court enunciated in an 8 (b) (4) (A) case. A reading of *International Brotherhood of Electrical Workers* v. *N. L. R. B., supra,* clearly shows that the decision of this Court in that 8 (b) (4) (A) case is not controlling in an 8 (b) (1) or 8 (b) (2) case. We need go no further to indicate the error of the Court below than to quote from the opinion of this Court, *viz.:*

"The intended breadth of the words 'induce or encourage' in Section 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of Section 8 (b). For example, the unfair labor practice described in 8 (b) (1) is one to 'restrain or coerce' employees; in 8 (b) (2) it is to 'cause or attempt to cause an employer.' * * * The scope of 'induce' and especially of 'encourage' goes beyond each of them. * * *"

"The remedial function of 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in 8 (b) (4). The general terms of 8 (c) appropriately give way to the specific provisions of 8 (b) (4)."

If the decision of this Court in the above case should now be extended to cases arising under 8 (b) (2) and 8 (b) (1), as the Court below has done, the protection of free speech guaranteed by 8 (c) will have been destroyed.

POINT III

There was no valid basis for the finding made in this case that the Union's conduct would or did "encourage membership."

The union contended that in refusing clearances it was not motivated by any purpose to "encourage membership"—another necessary ingredient of the offense charged—and further that its conduct did not have the effect of encouraging membership.

As to this, the Court below held that "whether the union's motive was, as it argues, to enforce the contract

provisions against discharging satisfactory radio officers, such as Kozel, is immaterial[4] * * *" and that its conduct in refusing clearance "displayed to all *non-members* the union's power and the strong measures it was prepared to take to protect union members" (R. A. 85). (Emphasis supplied.)

The theory upon which the Court below relied—that of "indirect" or "inherent" encouragement by the effect of the Union's action upon non-members—has been repudiated.

Thus the 8th Circuit in *N. L. R. B.* v. *Teamsters Union*, 196 F. (2) 1, said:

> "The testimony of Boston, however, shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union. The question then is, Would the act of the union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence substantial or otherwise to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by 'suspicion' and speculation. There is no evidence in the record either substantial or in the nature of a scintilla to support it."

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[4] In so ruling, the Court below also committed the error of eliminating the question of motive from consideration. The union's dilemma, created by the fact that the issuance of clearance to Fowler would have implied consent to the discharge of Kozel—a discharge expressly forbidden by the contract (R. A. 81) was deemed immaterial. Yet it is now settled beyond peradventure that motivation must be considered. It is not every discrimination which the Act proscribes. The discrimination must be practiced "to encourage or discourage membership". Thus an employer may discharge for any reason or no reason so long as he is not motivated by the desire to "encourage or discourage membership".

So too, in the case of *N. L. R. B.* v. *Reliable Newspaper Delivery Inc.* (3rd Cir.), 187 F. (2) 547, the Court said:

> "Even if we should assume * * * 'discrimination' then under the statutory language, we must go further and ascertain whether the discrimination 'encouraged membership' * * *.
>
> "Generally speaking, the proposition that in order to establish an 8 (a) (3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support."

So too, in the case of *N. L. R. B.* v. *Webb Construction Company* (8th Cir.), 30 L. R. R. M. 2125, decided May 8, 1952, the Court said:

> "There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. *N. L. R. B.* v. *Winona Textile Mills* (8th Circuit), 160 F. (2) 201; *N. L. R. B.* v. *Potlatch Forests* (9th Cir.), 189 F. (2) 82; *Western Cartridge Co.* v. *N. L. R. B.* (7th Cir.), 139 F. (2) 855. * * *
>
> "* * * Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members. No one is required to join the union and subject himself to such rules and regulations; neither is there any inhibition against his withdrawing from the union if such rules and regulations are not satisfactory to him.
>
> "We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act."

We urge that the decision of the Court below is in direct conflict with the above cited decisions of the Third, Seventh, Eighth and Ninth Circuits. Indeed, the Court below has just recognized this difference of opinion at least insofar as the Third Circuit is concerned. In a decision rendered by the Court below on June 24, 1952, in *N. L. R. B.* v. *Gaynor News Inc.* (not yet officially reported), the Court below said:

> "True the Third Circuit in the Reliable case (Reliable Newspaper Delivery, Inc., supra) went on to say that, even assuming unfair discrimination, it was up to the Board to prove that this discrimination had the purpose and effect of encouraging union membership. * * * Our own view comes to this: Discriminatory conduct, such as that practiced here, is *inherently conducive* to increased union membership. * * * To this extent *we find ourselves in disagreement with the Reliable case.* * * *" (Emphasis supplied.)

POINT IV

The Court below erred in judging the Union's rights and obligations by the application of a strict construction of the language of the contract, rather than the actual practices and interpretation thereof by the parties.

It was undisputed that if a valid hiring hall arrangement was in existence at the times here pertinent, the Union's actions were justified and protected by the Act.

Both the Board and the Court below held that the language of the contract did not justify the operation of a hiring hall, although concededly a typical lawful hiring hall arrangement had been in practice by the parties when their collective bargaining agreement was extended for the one year period commencing August 16, 1947.

In advocating a test which exalts form over substance the Board relied on the cases of *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 695; *N. L. R. B.* v. *Don Juan, Inc.* (C. A. 2), 178 F. (2nd) 625, 627; and *N. L. R. B. v. Mason Manufacturing Co.* (C. A. 9), 126 F. (2nd) 810, 813.

We urge that in adopting the Board's contention on this score, the Court below misread the teachings of these cases. Carefully read, it is apparent that these cases stand for the proposition that where a union security provision is invoked as a defense to conduct which would be otherwise discriminatory, there must be "a sufficient showing" of the existence of such a valid union security arrangement; but these cases do not hold that when such a valid security arrangement exists in fact it must be disregarded for defects in form. Indeed, in *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.* (*supra*), the Board found that a written contract was modified by an *oral* provision pertaining to a closed shop. This Court did not disturb this finding but rather rested its decision on the fact that the Union there involved was an "assisted" one.

So, too, in the cases of *N. L. R. B.* v. *Don Juan, Inc.* (*supra*), and *N. L. R. B.* v. *Mason Manufacturing Co.* (*supra*), the Court said that there must be "a sufficient showing" that there was a contract for a closed shop.

It is apparent from a reading of all of these decisions that the requirement of "a sufficient showing" was designed to prevent "discrimination" sought to be accomplished on the basis of a pretext or an afterthought, or by a union which did not qualify as one entitled to enforce such union security provisions. But those considerations have no application here; for in the instant case there was "a sufficient showing" that, in fact, a lawful hiring hall arrangement existed.

The error of which the Board and the Court below were guilty in this case was pointed out in the case of *N. L. R. B.*

v. *Scientific Nutrition Company* (C. A. 9), 180 F. 2nd 447, where the Court said:

> "We are persuaded that this concentration on the terms of the writing led the Board to overlook or disregard material and uncontroverted evidence tending to show that Capolino and Local 22832 had long *understood* and *administered* their contract as requiring membership in the local as a condition of employment." (Emphasis supplied.)

The contention that strict construction of verbiage is required even where such strict construction is unnecessary to avoid discrimination based on a pretext or afterthought, is all the more surprising when viewed in the light of other recent decisions of the Board which have disregarded form in favor of substance.

Thus in the case of *Boilermakers AFL* (*Consolidated Western Steel Corporation*), 94 N. L. R. B. 1590, the Board said: "On its *face* the hiring clause appears to be *lawful*" • • • yet "This hiring *procedure,* involving preference in hiring to union members, is *unlawful.*" (Emphasis supplied.)

Indeed, ironically, the Board has recently held that a clearly expressed unlawful closed shop provision was not violative of 8 (a) (3) and 8 (b) (2) because of "the absence of an intention to enforce it." *Port Chester Electrical Construction Corp.*, 97 N. L. R. B. No. 59.

Fairly read, the record in the instant case leaves no doubt that a lawful hiring hall arrangement existed in fact and that its practice by the parties was unquestionably *ante litem motam.*

Under these circumstances, the use of a rule of strict construction, adopted by our courts to prevent injustice, should not be invoked to produce injustice.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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